No. 88-671

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD A. SPRAGUE,

Appellant

v.

GREG WALTER, KENT POLLOCK, HOWARD SHAPIRO, EUGENE L. ROBERTS, JR., CREED C. BLACK, MICHAEL PAKENHAM, AARON EPSTEIN, PHILADELPHIA NEWSPAPERS, INC., AND KNIGHT NEWSPAPERS, INC.,

Appellees

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does the Court lack jurisdiction over this appeal where: a) the Pennsylvania Supreme Court did not pass on the federal question presented in the jurisdictional statement; and b) appellant failed to brief the federal question in the Pennsylvania Supreme Court and raised it belatedly in his application for reargument, which was summarily denied?

2. Does the Court lack jurisdiction, by appeal or by writ of certiorari, where there is no final judgment and the Pennsylvania Supreme Court remanded the proceedings for a new trial on two grounds, one of which involved a state law issue wholly unrelated to the federal question raised here?

3. Is plenary review of a due process claim unwarranted in a public official defamation suit where a state Shield Law is interpreted to allow a newsperson to refer to undisclosed sources?

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Appellees

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss this appeal on the ground that there is no jurisdiction under 28 U.S.C. §1257 because 1) the Pennsylvania Supreme Court did not address, and appellant did not properly present below, the federal due process question raised in the jurisdictional statement; and 2) there is no final judgment in this case, which has been remanded for a new trial. In the alternative, appellees move to dismiss or affirm the judgment below on the ground that the

question presented is so insubstantial that plenary review is unwarranted.

STATUTORY PROVISIONS INVOLVED

The jurisdictional issues raised by the motion to dismiss involve 28 U.S.C. §1257 (amended by Pub.L. No. 100-352, §3, 102 Stat. 662, effective Sept. 25, 1988), which provided, in pertinent part at the relevant time, that certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" may be reviewed by this Court and that such review may be "[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity . . . ."

The Pennsylvania Shield Law involved in the underlying dispute, 42 Pa.C.S. §5942, provides, in pertinent part, as follows:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

STATEMENT

Appellant Richard A. Sprague, then first assistant district attorney of Philadelphia, brought this defamation action based on a series of articles published in *The Philadelphia Inquirer*. Defendants were several reporters and editors of *The Inquirer*, as well as Philadelphia Newspapers, Inc., the publisher of the newspaper, and

its parent company (hereinafter collectively referred to as "PNI") (J.S. App. A-3-A-4).[1]

This case was tried before a jury in the Court of Common Pleas of Philadelphia County. The question of reporters' confidential sources first arose during pretrial discovery. The Pennsylvania Shield Law provides that newspersons shall not be "required to disclose the source of any information" in judicial proceedings. 42 Pa.C.S. §5942. Pursuant to a pretrial ruling on motion to compel production of documents, defendants produced all unpublished materials except those documents or portions thereof that referred to, or would tend to identify, a confidential news source (*see, e.g.*, R. 2960a-2998a, 3034a-3044a). PNI thus produced to Sprague its reporters' notes and files, including documents obtained from both disclosed and confidential sources, redacting only the names of confidential sources and identifying references (*see, e.g.*, J.S. App. A-47-A-50).

For example, PNI produced the reporters' transcription of a "prosecution memorandum," prepared by the Pennsylvania attorney general, which related to one of the challenged statements in the article in suit. Although the source who provided access to the prosecution memorandum was not disclosed, the reporters' transcription revealed to Sprague the content, the author and the recipient of the original document upon which the article in suit was partly based (*see* J.S. App. A-23).

The question of the scope of the Shield Law next arose during the defense portion of the trial, when a reporter referred to a confidential source for a particular piece of information (J.S. App. A-5). The trial court

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1. Philadelphia Newspapers, Inc. is a wholly owned subsidiary of Knight-Ridder, Inc., whose predecessor's (Knight Newspapers, Inc.) motion for nonsuit was granted at the close of Sprague's case. At the commencement of trial, Sprague dismissed the reporters and editors as defendants, although they were treated as parties for trial purposes (J.S. App. A-5 n.2).

entered an order holding the Shield Law "inapplicable" and directing PNI to "disclose its sources" (J.S. App. A-6). The court further ordered that if PNI did not reveal its sources "it is precluded from defending this action on the grounds that the articles in suit, or any portion thereof, were based upon information received" from an undisclosed source. Under the court's ruling, "all evidence of what information defendants received from allegedly reliable, but undisclosed sources, shall be excluded." (*Id.*). For example, PNI was not allowed to refer to the "prosecution memorandum," which had been produced during discovery, merely because Sprague was not told who provided PNI access to it (J.S. App. A-23).

After a $4.5 million jury verdict was returned in favor of Sprague, PNI appealed to the Pennsylvania Superior Court. That intermediate appellate court reversed the trial court's Shield Law ruling and ordered a new trial. The Superior Court held that the Shield Law did apply in this case, and interpreted that statute as precluding a trial court from " 'exacting' a penalty upon the defendant for its exercise of a statutory right . . . ." (J.S. App. A-29). In addition, the Superior Court held that a new trial was required, in any event, on a separate and independent state law ground unrelated to the Shield Law. That is, the trial court erred under state law by instructing the jury that it could draw an adverse inference from PNI's failure to call as a witness one of its employees, Greg Walter, who was equally available as a witness to Sprague (J.S. App. A-53-A-54).

As to the Shield Law issue, Sprague expressly argued to the intermediate appellate court that his federal due process rights would be violated by applying the statutory privilege to protect PNI's confidential sources (J.S. App. A-30). The Superior Court rejected his Fourteenth Amendment argument and accepted PNI's position that the proper course under the Shield Law was to allow reporters to refer to confidential

sources without identifying them. The reporters could then be cross-examined about all information they had prior to publication, and the jury would be free to believe or disbelieve their testimony concerning the existence and reliability of confidential sources (J.S. App. A-32).

Although he had briefed the federal due process argument in the Pennsylvania Superior Court, which rejected it, Sprague deleted that argument when he appealed to the state Supreme Court.[2] Accordingly, the Pennsylvania Supreme Court's opinion does not address due process under the Fourteenth Amendment.[3] Rather, that court upheld the Superior Court's grant of a new trial purely on state law grounds. In addition to remanding on the "adverse inference" question relating to Greg Walter (J.S. App. A-17 n.9), the Supreme Court was "constrained under the rules of statutory interpretation" to accept the Shield Law's "plain meaning" and to apply the statute in defamation proceedings to protect a media defendant from being forced to disclose its sources (J.S. App. A-10).

Citing its earlier rulings interpreting the Shield Law, the Pennsylvania Supreme Court stated that the

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2. Although Sprague's third "Question Presented" in his Pennsylvania Supreme Court brief was "whether the Shield Law is unconstitutional" (Brief for Appellant, p.2), that vague question referred to his argument based on reputational rights under the Pennsylvania Constitution (Brief for Appellant 35-36). The 47-page brief to the Pennsylvania Supreme Court makes no reference to the due process clause of the Fourteenth Amendment, or any cases interpreting that provision, although it makes passing reference to "due process," such as describing the trial court's ruling as preserving, *inter alia*, "due process" (*id.* at 28; *see id.* at 19, 32).

3. The only federal question the Pennsylvania Supreme Court addressed was whether the First Amendment "would require the creation of inferences in favor of the media defendant," *i.e.*, an inference as to an undisclosed source's reliability (J.S. App. A-13). The Court concluded that no such inference in favor of the media defendant was required by the First Amendment (J.S. App. A-13-A-15).

law reflects the "strong societal purpose in fostering uninhibited disclosure between individuals and the media." (J.S. App. A-11). Under the Court's interpretation of the Shield Law, a reporter's use of the privilege "does not foreclose the media defendant from introducing extrinsic evidence to establish the validity of the information or to demonstrate that they [sic] acted responsibly in the dissemination of the information." (J.S. App. A-12). By introducing such evidence, "the media defendant is not required to abandon its Shield Law privilege." (J.S. App. A-12).

Given its interpretation of the Shield Law, the Supreme Court concluded that the trial court's rulings ordering disclosure of confidential sources, and imposing sanctions for nondisclosure, required the grant of a new trial (J.S. App. A-15-A-16). The Court emphasized that, at the new trial, Sprague would be free to introduce evidence and otherwise challenge the reliability of the information PNI relied on and the credibility of its asserted sources (J.S. App. A-17).

In his application for reargument, Sprague for the first time briefed the federal due process argument to the Pennsylvania Supreme Court, arguing that the Superior Court's Shield Law ruling, now affirmed, effectively destroyed his opportunity to prove his defamation claim. The Court denied Sprague's rehearing request in a summary order, without explanation (J.S. App. A-1).

ARGUMENT

1. The Court Has No Appellate Jurisdiction Under 28 U.S.C. §1257(2) Because The Pennsylvania Supreme Court Did Not Address The Due Process Issue, Which Sprague Failed To Raise In A Proper Manner.

The basic requirement for appellate jurisdiction is lacking. The Pennsylvania Supreme Court did not reject a challenge to the state Shield Law "on the ground of its

being repugnant to the Constitution, treaties or laws of the United States," as required by 28 U.S.C. §1257(2).

Sprague is unable to show that the Pennsylvania Supreme Court passed upon the federal due process question he seeks to raise here.[4] Accordingly, there is no appellate jurisdiction in this Court. *E.g., Peralta v. Heights Medical Center, Inc.*, 485 U.S. ____, 99 L.Ed.2d 75, 80 n.4 (1988); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

As this Court has repeatedly stated, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. at 181 n.3, quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974), and *Street v. New York*, 394 U.S. 576, 582 (1969).

Appellant Sprague can make no such affirmative showing here. Rather, he states only that his Petition for Allowance of Appeal to the Pennsylvania Supreme Court raised the Fourteenth Amendment due process issue (J.S. 7). Raising the issue in the petition for discretionary appeal, however, is clearly not sufficient where, as here, Sprague then failed to argue the issue to the Pennsylvania Supreme Court in his brief on the merits. An issue raised in a lower Pennsylvania court is waived if it is not briefed or argued to the Pennsylvania Supreme Court. *See Harmon v. Chambers*, 358 Pa. 516, 522, 57 A.2d 842, 845 (1948), and cases cited therein.

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4. The jurisdictional statement cites only the Pennsylvania Supreme Court's statement that it granted review "because the issues herein implicate the relationship between the *federal and state constitutional provisions relating to free speech and reputation* and the statutorily created privilege conferred upon a media defendant, commonly known as the 'Shield Law.' " (J.S. 7, quoting J.S. App. A-3) (emphasis supplied). The state Supreme Court's opinion nowhere mentions due process.

Under Pennsylvania law, Sprague's attempt to address the federal process claim before the state Supreme Court for the first time in his application for reargument came too late. Under long-standing precedent, the Pennsylvania Supreme Court will not consider a Fourteenth Amendment claim presented to it for the first time on application for reargument. *In re: Dorrance's Estate,* 172 A. 900 (1933), *adhering to* 309 Pa. 151, 163 A. 303, *cert. denied,* 287 U.S. 660 (1932) and 288 U.S. 617 (1933).[5]

Under these circumstances, there is no appellate jurisdiction in this Court over the federal due process claim because there is no affirmative showing that the issue was decided by the court below. *See Exxon Corp. v. Eagerton,* 462 U.S. at 181 n.3; *Bailey v. Anderson,* 326 U.S. 203, 206-207 (1945). On the contrary, there is every indication that the Pennsylvania Supreme Court did not decide the due process issue appellant seeks to present here.

2. This Court Has No Jurisdiction, By Appeal Or Writ Of Certiorari, Under 28 U.S.C. §1257 Because There Is No "Final Judgment" In This Case, Which Has Been Remanded For A New Trial.

In any event, there is no jurisdiction in this Court for a second reason. There is no final judgment or decree by the Pennsylvania Supreme Court, as required for review on appeal, or by writ of certiorari, under 28 U.S.C. §1257. The Pennsylvania Supreme Court's ruling did

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5. Nor do the Pennsylvania rules of appellate procedure contemplate the grant of reargument when an appellant in that court has failed to brief an issue prior to the court's ruling. *See* Pa.R.A.P. 2543 and official note thereto. Reargument would have been particularly inappropriate under the Pennsylvania rules because Sprague had failed to give notice to the Pennsylvania attorney general, as required whenever a party "draws in question the constitutionality of any statute in any matter . . . ." Pa.R.A.P. 521(a).

not put an end to the litigation, but merely ordered a new trial. Under the general rule, such a remand for substantive proceedings means that the judgment is nonfinal and nonreviewable by this Court. *See San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621, 632-33 (1981); *O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Flynt v. Ohio,* 451 U.S. 619 (1981). Adherence to the finality rule is particularly appropriate here where: 1) a new trial is required on a state law ground that is wholly unrelated to the Shield Law question; and 2) the new trial will undoubtedly raise other federal questions, such as those related to the First Amendment.

This case does not fit within any of the four categories of cases described in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), in which sufficient "finality" will be found despite a remand for further proceedings. First, the federal due process issue is not conclusive, and the outcome of the new trial is not preordained. *See Cox Broadcasting,* 420 U.S. at 479. Under the ruling below, Sprague retains the opportunity to attempt to prove that PNI published a defamatory falsehood with knowledge of falsity or subjective awareness of probable falsity. The Pennsylvania Supreme Court expressly held that the plaintiff is free to introduce evidence and otherwise attempt to convince the jury of the non-existence and unreliability of information from confidential sources (J.S. App. A-17). While Sprague makes a theoretical argument that the application of the Shield Law devastates his chance to prove constitutional malice, there is no factual support for this assertion and an ultimate verdict in PNI's favor is certainly not a foregone conclusion.

Second, the federal due process issue will not necessarily survive and require decision regardless of the outcome of the new trial. *See Cox Broadcasting,* 420 U.S. at 480-81. On the contrary, Sprague could conceivably prevail under proper legal standards at the new

trial, in which case his argument of deprivation of due process rights would evaporate.

Third, later review of the federal issue will not be foreclosed in all events. *See Cox Broadcasting*, 420 U.S. at 481-82. If Sprague loses on remand, so that his due process claim does not become moot, he may still press that federal claim through the state courts and again present the issue to this Court. The possibility for later review in this Court exists even if the Pennsylvania Supreme Court should apply the "law of the case" doctrine and decline to hear the due process claim on the second appeal because of Sprague's previous waiver of that argument. *See, e.g., Mercer v. Theriot*, 377 U.S. 152, 153 (1964).

Finally, this case does not fit the fourth *Cox Broadcasting* category. Reversal of the state court on federal due process grounds would not preclude further litigation because a new trial is required, in any event, on the unrelated "adverse inference" ruling. Moreover, reversal on the due process issue would "merely control[]. . . the nature and character of, or determin[e] the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting*, 420 U.S. at 482-83. The Shield Law ruling below governs the admission of evidence and does not dictate the outcome.

In short, there is no "final" judgment or decree by the state court. Therefore, there is no jurisdiction, by appeal or writ of certiorari, in this Court.

3. There Is No Substantial Due Process Question Meriting Plenary Review Where A State Shield Law Is Interpreted To Allow A Newsperson To Refer To Undisclosed Confidential Sources In A Public Official Defamation Suit.

Sprague argues that the due process clause of the Fourteenth Amendment bars the use of Pennsylvania's Shield Law to protect the identities of confidential

sources in a public figure defamation trial at which a reporter refers to information obtained from undisclosed sources. Under Sprague's argument, this interpretation of the Shield Law effectively forecloses a finding of constitutional malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and thus deprives him of a fundamental right without due process. This is virtually the same due process argument that was rejected by the Third Circuit, and which this Court declined to hear, in *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 780 F.2d 340, 342 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1187 (1986).

As in *Coughlin*, full review of the due process issue in this case is unwarranted.[6] As this Court has recognized in the context of grand jury investigations, creation of evidentiary privileges for newspersons is a matter left to state law and state constitutions. "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

Accordingly, in a much broader ruling than the decision below, the Third Circuit in *Coughlin* upheld the use of Pennsylvania's Shield Law to prevent discovery of all unpublished investigative documents, whether relating to confidential sources or not.[7] Without mentioning

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6. Appellant here challenges only the Shield Law, not the application of the *New York Times Co. v. Sullivan* constitutional malice principles. *Compare Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 476 U.S. at 1187-88 (Burger, C.J., dissenting). In its present posture, the instant case does not pose any constitutional malice issues, such as those to be reviewed in *Harte-Hanks Communications, Inc. v. Connaughton, cert. granted*, 57 U.S.L.W. 3280 (U.S. Oct. 18, 1988) (No. 88-10).

7. In *Coughlin*, the plaintiff was denied access to all unpublished documents, including reporters' notes and broadcast outtakes, and to general editorial processes. *See Coughlin*, 780 F.2d at 344 (Becker, J., concurring). The Pennsylvania Supreme Court has

any subsequent restriction on defendants' evidence at trial, the Court rejected an argument that the statutory privilege deprived a public official defamation plaintiff of federal due process rights. 780 F.2d at 342.

While the Pennsylvania Supreme Court did not address this issue, the intermediate appellate court correctly rejected the due process argument in the instant case (J.S. App. A-30-A-31). Whether viewed in terms of procedural or substantive due process, an evidentiary privilege for newspersons' confidential sources fully comports with Fourteenth Amendment rights of defamation plaintiffs.

First, the Shield Law withstands the balancing test for measuring procedural due process, as set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), even though the Pennsylvania Constitution creates a "property" interest in reputation. (*See Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 193, 532 A.2d 346, 350 (1987).)[8] The state's interest in the Shield Law outweighs the risk that a public official plaintiff will be erroneously deprived of a defamation recovery. Pennsylvania has struck a reasonable and appropriate balance between reputational rights and its interest in a free and uninhibited press. The Shield Law plays a vital role in furthering the state's interest in protecting the "stream of information flowing to reporters and then to the public" provided by confidential sources who are guaranteed protection even if libel litigation ensues. *Coughlin*, 780 F.2d at 352 (Becker, J., concurring). The libel

NOTES *(Continued)*

subsequently interpreted the Shield Law more narrowly to protect only the identities of confidential personal sources, not the discovery of documentary sources such as reporters' notes. *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 195, 532 A.2d 346, 351 (1987). PNI produced its reporters' notes and files in the case, as subsequently required by *Hatchard*.

8. Federal rights do not make reputation alone a liberty or property interest protected by the due process clause. *See Paul v. Davis*, 424 U.S. 693, 711 (1976).

plaintiff, on the other hand, "is not denied his opportunity to bring his case to court and have it heard; victory, while not easy, is also not impossible." *Id.*

The fairness of the balance struck by the Pennsylvania legislature is readily demonstrated by the facts in this record. Sprague had and used at trial PNI's reporters' notes and files; only the names of, and identifying references to, confidential sources were redacted. Having the reporters' pre-publication files gave Sprague a fair chance to prove constitutional malice, if there was any, despite the nondisclosure of the identity of certain sources.

For example, the identity of the person who provided PNI access to the government prosecution memorandum (see pp. 3-4, *supra*) is irrelevant. Sprague had the transcribed memorandum itself, so he had the opportunity to cross-examine not only the reporters but also the memorandum's author and other witnesses as to the reliability of that document. This is but one example of the avenues open to Sprague in his attempt to prove publication with knowledge of falsity or awareness of probable falsity.

Sprague's argument that he is effectively foreclosed from proving constitutional malice, on the other hand, is entirely theoretical and certainly premature at this juncture. As the Pennsylvania Supreme Court was careful to explain, its ruling allows Sprague, at the new trial, to attempt to convince the jury of the inaccuracy of the information supplied and the unreliability of confidential sources. The libel plaintiff will thus rely on time-honored tests of credibility. For example, jurors may be hard-pressed to accept a reporter's "confidential source" testimony if the underlying information is inaccurate, the reporters' notes show conflicting information or the failure to verify, or if the information is inherently improbable. *See generally St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Under the Pennsylvania Supreme Court's rule, in sum, the libel plaintiff retains a reasonable opportunity to challenge a reporter's reliance on undisclosed sources. The attack is simply limited to the information obtained and may not reach the reporter's sources themselves. This limitation of plaintiff's evidentiary weapons clearly does not amount to a denial of procedural due process.

Similarly, Sprague has no colorable substantive due process argument, based on alleged deprivation of his "right" to sue. As this Court has held in upholding a state's decision to bar completely a cause of action allegedly protected by the due process clause, "the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 181 (1980). Pennsylvania's Shield Law privilege is far from irrational because it so directly promotes the state's substantial interest in furthering the free flow of information.

Finally, Sprague has shown no conflict on the due process issue. In addition to the Third Circuit in *Coughlin*,[9] other courts have rejected constitutional due process challenges to newspapers' Shield Law privileges. *See Ex Parte Sparrow*, 14 F.R.D. 351, 353 (N.D. Ala. 1953); *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, 385, *cert. denied*, 459 U.S. 907 (1982). *See also Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. App. 1984) (Indiana Shield Law allowing full use of newsperson's privilege at trial held not violative of state due process rights).

On the other hand, Sprague is unable to show any court decision that strikes down a newsperson's Shield Law on due process grounds. While he cites two lower

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9. *See also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 278-79 n.74 (3rd Cir. 1980).

court cases limiting the use of particular Shield Laws at trial, those decisions merely construe particular statutes on state law grounds and do not reach the due process issue. *See Laxalt v. McClatchy*, 116 F.R.D. 438, 452-53 (D. Nev. 1987); *Greenberg v. C.B.S.*, 69 A.D. 2d 693, 419 N.Y.S.2d 988, 996 (1979).[10]

In fact, Sprague cites no cases striking down any evidentiary privilege on due process grounds. On the contrary, in addition to newspersons' Shield Laws, other evidentiary privileges are routinely deemed to comport with due process requirements. *See, e.g., Samuelson v. Susen*, 576 F.2d 546, 553 (3rd Cir. 1978) (Ohio privilege for medical review proceedings); *Rosen v. N.L.R.B.*, 236 App. D.C. 298, 735 F.2d 564, 577 (D.C.Cir. 1984) (attorney-client privilege).

In summary, Sprague has failed to demonstrate any substantial due process issue justifying plenary review. Particularly at this stage of the proceedings, before a new trial implementing the Pennsylvania Supreme Court's Shield Law ruling, there is no due process claim warranting this Court's review.

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10. Similarly, the court did not limit the Pennsylvania Shield Law on due process grounds in *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523, 529 n.3 (E.D.N.Y. 1979). The court merely mentioned in dictum the option of limiting defendants' proof at trial, on state law grounds. Nor did the court address due process rights in *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251, 257 (1975), *cert. denied*, 426 U.S. 907 (1976). That case mentioned but did not pass on a lower court order, not based on a Shield Law, which limited a defendant's use of evidence from undisclosed sources.

CONCLUSION

For these reasons, appellees' motion to dismiss should be granted for lack of jurisdiction. In the alternative, the motion to dismiss or affirm should be granted for failure to present a substantial question of federal due process.

Respectfully submitted,

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